No. 88-158

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHOENIX CANADA OIL COMPANY LIMITED,

Plaintiff-Petitioner,

—v.—

TEXACO PETROLEUM COMPANY, ECUADORIAN GULF OIL COMPANY and GULF OIL CORPORATION (now, by change of name, CHEVRON U.S.A. INC.),

Defendants-Respondents,

—and—

TEXACO INC.,

Defendant.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Of Counsel:
Milton Sherman
Scott M. Berman
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, New York 10022
Attorneys for Respondents Texaco Petroleum Company, Ecuadorian Gulf Oil Company and Gulf Oil Corporation (now, by change of name, Chevron U.S.A. Inc.)

LAWRENCE R. JERZ
2000 Westchester Avenue
White Plains, New York 10650
Attorney for Respondent Texaco Petroleum Company

MILTON J. SCHUBIN
425 Park Avenue
New York, New York 10022
(212) 836-8000
Counsel of Record and Attorney For Respondents Texaco Petroleum Company, Ecuadorian Gulf Oil Company and Gulf Oil Corporation (now, by change of name, Chevron U.S.A. Inc.)

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RULE 28.1 LIST

The parent company of Texaco Petroleum Company ("Texaco Ecuador") is Texaco International Financial Company, which is wholly owned by Texaco Overseas Holding, Inc. Texaco Overseas Holding, Inc. is wholly owned by Texaco Refining and Marketing, Inc. Texaco Refining and Marketing, Inc. is wholly owned by Texaco Inc. ("Texaco").* The only affiliate or subsidiary of Texaco Ecuador, owned in part by entities or individuals outside the Texaco organization is Compania Texaco de Petroleos del Ecuador, C.A.

The parent company of Ecuadorian Gulf Oil Company ("Gulf Ecuador") is Trans Ocean Chevron Company, which is wholly-owned by Chevron Corporation. There are no affiliates and subsidiaries of Gulf Ecuador owned in whole or part by entities or individuals outside the Chevron organization.

The parent company of Gulf Oil Corporation (now, by change of name, Chevron U.S.A. Inc.) ("Gulf") is Chevron Corporation. The affiliates and subsidiaries of Chevron U.S.A. Inc. owned in part by entities or individuals outside the Chevron organization are as follows:

American Overseas Petroleum Limited
Arabian American Oil Company
Associated Octel Company Limited
Caltex Petroleum Corporation
Gaviota Gas Plant Company
Hong Kong Refuelling Company Ltd.
Iranian Oil Participants Limited
P. T. Caltex Pacific Indonesia
Pembroke Capital Company Inc.

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* Texaco Inc. was originally a party to this action and participated in the trial. In April, 1987, it filed a petition for protection under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101 *et seq.* Based on the automatic stay provision in the Bankruptcy Code, 11 U.S.C. § 362, the district court did not enter final judgment in favor of Texaco Inc. and it was not a party to the proceedings before the United States Court of Appeals for the Third Circuit.

Stillwater Mining Company
Stillwater PGM Resources
Valley Pines Associates
Valley Venture Capital Fund Ltd. Partnership

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STATEMENT OF THE CASE

Petitioner Phoenix Canada Oil Company Limited ("Phoenix") seeks review of the district court's determination, unanimously affirmed by the court of appeals, that its unjust enrichment claim has no factual basis. The ruling followed from the district court's: (a) legal conclusion that the unjust enrichment claim turns on whether the Government of Ecuador, when it became a participant in an oil concession in Ecua-

dor, reimbursed Texaco Ecuador and Gulf Ecuador for their investments or paid them for rights to produce oil, and (b) finding of fact that the Government reimbursed the companies for their investments.

Phoenix contends that the act of state doctrine requires that the fact issue of what the Government paid for be resolved solely by reference to selected phrases in selected documents, principally Spanish-language decrees and a regulation of the Government of Ecuador. Phoenix argues further that the district court, by finding as a fact, that the Government reimbursed the Companies for their investments, violated the act of state doctrine by "invalidating" the decrees and regulations, which Phoenix asserts establish that the Government paid for rights to produce oil.

The central issue raised by Phoenix's petition is the interpretation of Ecuadorian decrees and a regulation. These pronouncements relate solely to the transactions at issue here and their construction is a matter of significance only to the parties to this action. This alone is ample reason to deny Phoenix's petition. Even if the Court were to decide to devote its resources to interpreting the Ecuadorian decrees and regulation, Phoenix's proffered constructions are incorrect and it has not raised any legitimate act of state issue. The act of state doctrine precludes United States courts from addressing the legality of the acts of a foreign sovereign. The courts below did not conclude that the decrees and regulation were issued in violation of the law of Ecuador and the district court, in finding that the Government reimbursed the Companies for their investments, did not determine that the Government violated the law of Ecuador.

Statement of Facts

Respondents set out below a brief statement of the pertinent facts and prior proceedings.[1]

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1 Comprehensive recitations of the facts and prior proceedings are set out in the opinions of the lower courts. (A40-A116; A3-A12.)

A. Background

In July 1961, the Government of Ecuador granted a concession to Minas y Petroleos del Ecuador, S.A. ("Minas"), an Ecuadorian corporation, authorizing it to explore for oil in the jungle region of eastern Ecuador and to exploit such reserves as it might discover. (A4; A46.)[2] On July 16, 1965, Minas, in a contract executed in Ecuador, agreed to assign to two Ecuadorian subsidiaries of Texaco Inc. ("Texaco") and Gulf Oil Corporation ("Gulf"), a portion of the concession which came to be known as the Coca Concession. (A4; A51-52.) The Texaco and Gulf subsidiaries agreed to pay Minas: (a) a lump sum payment when the proposed assignment was approved by the Government of Ecuador, and (b) if they discovered reserves and commercially produced and sold crude oil, future payments to be made quarterly in amounts equal to 2% of the value of such crude oil as they sold. (A41; A52-53.) Minas assigned its interest in future 2% payments to Phoenix and another corporation. (A64-68.)

Beginning in 1969, Texaco Petroleum Company ("Texaco Ecuador") and Ecuadorian Gulf Oil Company ("Gulf Ecuador")[3], which operated the Coca Concession for the Ecuadorian subsidiaries of Texaco and Gulf, made a series of highly successful wildcat discoveries. (*See* A5; A54.) In May 1972, they began to commercially produce and sell crude oil from the Coca Concession. (A5; A54.) During the period from 1966 through 1972 the Companies invested huge sums of money to explore the concession area and then to acquire and install the infrastructure, including a pipeline to transport the oil from eastern Ecuador across the Andes Mountains and a marine terminal on the Pacific Coast, required to exploit the reserves they discovered. (A54-55; A5.) By 1972, the Companies' investment had exceeded $240,000,000. (A62.) Neither Minas nor Phoenix contributed to the investment. (A93-94.)

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2 References to "A" are to Appendix A to the petition for certiorari.

3 Texaco Ecuador and Gulf Ecuador are referred to herein as the Companies.

B. The 1974 and 1977 Transactions

In 1974, approximately two years after Texaco Ecuador and Gulf Ecuador had begun to commercially produce and sell crude oil (A5; A54), the Government of Ecuador forced the Companies to transfer a 25% interest in the Coca Concession to the state-owned oil company, Corporacion Estatal Petrolera Ecuatoriana ("CEPE"). (A79-91; *see* A6-7.) The Government unilaterally determined that it would pay the Companies an amount precisely equal to 25% of the actual cost of their investments in the concession, reduced by depreciation. (A91-93; A7.)

During the period from 1974 through 1976 the Government imposed on the Companies a series of expropriatory measures which drastically reduced the profitability of their operations. (A97-104; A8.) The Companies and the Government clashed frequently over these measures and the Government's implementation of them. (A101-104.) At the end of 1976, Gulf Ecuador faced a Government declaration of forfeiture of its remaining 37.5% interest in the Coca Concession as a result of confrontations with the Government. (A104.) Under this pressure, it negotiated an agreement with the Government providing that Gulf Ecuador would leave Ecuador and the Government would succeed to Gulf Ecuador's 37.5% interest in the concession as of December 31, 1976. (A 104-105; A8-9.) As in the case of the 1974 transaction, the Government limited its payment to Gulf Ecuador to the cost of its remaining investments in Ecuador, less depreciation. (A105-107; A9.)

C. The Effect of the 1974 and 1977 Transactions on the 2% Payments

The Minister of Natural Resources and Energy of the Republic of Ecuador (the "Minister") specifically addressed the effect of the 1974 and 1977 transactions on the quarterly 2% payments. In a regulation issued three days before the date CEPE's 25% participation became effective, the Minister directed that neither the Companies nor CEPE was to make 2% payments on the 25% of oil production that CEPE received based on the

1974 transaction. (A94-95; *see* A18-20.) Four months after the regulation, the Minister extended the prohibition on 2% payments to any increased participation above 25% that CEPE might obtain in the future. (A96-97.) Based on the foregoing, the Companies stopped making 2% payments first on CEPE's 25% share of oil production and then on CEPE's additional 37.5% share of oil production. (A96-97.) Texaco Ecuador continued to make 2% payments on its 37.5% of production. (A9.)

Proceedings Below

Phoenix commenced this diversity action in the United States District Court for the District of Delaware on November 26, 1976 against Texaco, Gulf, Texaco Ecuador and Gulf Ecuador. (A40-41.) In its Complaint and Supplemental Complaint, Phoenix asserted three purported claims based on the 1974 and 1977 transactions: (a) a breach of contract claim, seeking damages equal to the total amount of the 2% payments on CEPE's oil production from the Coca Concession; (b) in the alternative, an unjust enrichment claim seeking portions of the compensation the Government paid to the Companies in connection with the 1974 and 1977 transactions; and (c) an intentional infliction of economic injury or *prima facie* tort claim seeking compensatory and punitive damages. (A40-41.)[4]

On defendants' motion for summary judgment, the district court, based on two careful and detailed magistrate's reports, dismissed Phoenix's breach of contract and tort claims. (A42-43.)[5] The district court denied summary judgment on Phoenix's unjust enrichment claim, concluding that its resolution turned

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4 Phoenix also asserted a breach of contract claim unrelated to the 1974 and 1977 transactions, for alleged deficiencies in the 2% payments for three quarterly periods—the fourth quarter of 1973 and the first two quarters of 1974. (A44-45.)

5 The district court held that Phoenix's breach of contract claim was governed by Ecuadorian law, that the Ecuadorian law applicable to the claim was the Minister's 1974 regulation and judgment, and that the claim failed as a matter of law. (A42.) The district court dismissed Phoenix's tort claim because the underlying acts were either time-barred or not tortious. (A42-43.) Phoenix has not challenged either of these determinations in its petition.

on a fact question—whether the Government had paid the Companies for rights to produce oil or whether it had reimbursed them for their investments in the concession—that the documents before it were not sufficiently clear to resolve the question of what the Government paid for, and that a trial was necessary to resolve this fact issue. *Phoenix Canada Oil Co. Ltd.* v. *Texaco, Inc.*, 560 F. Supp. 1372, 1384 (D. Del. 1983).

The district court then conducted a lengthy trial at which it received extensive evidence on the issue of what the Government paid for in the 1974 and 1977 transactions. After the trial, the court, in a detailed opinion, meticulously analyzed the evidence and found that it overwhelmingly demonstrated that the Government of Ecuador had reimbursed the Companies for their investments in Ecuador and had not paid anything for rights to produce oil. (A113-117; A10.)[6] Based on its finding, the district court granted judgment dismissing the unjust enrichment claim. (*Id.*)

Phoenix appealed from the dismissal of its unjust enrichment claim. The court of appeals thoroughly reviewed the evidence

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6 The district court relied primarily on the following evidence:

— The uniform testimony of all witnesses who directly participated in the 1974 and 1977 transactions, including Ecuador's Minister of Natural Resources in 1974 and his legal advisor, that the Government had paid the Companies only for their unrecovered investments in producing and pipeline assets and had paid nothing for rights to produce oil. (A113-A114.)

— The amounts that the Government paid to the Companies, which were precisely equal to the cost of their unrecovered investments, reduced by depreciation. (A114.)

— The law and policy of the Government with respect to Ecuador's hydrocarbons resources, which it had consistently applied in other circumstances involving the Companies' interests in the Coca Concession, that concession rights were part of Ecuador's national patrimony and the Government could not as a matter of Ecuadorian law pay for petroleum reserves or rights to exploit them. (A114; A80-81; A85-90).

— The Minister's hostility to the concept of the 2% payments, which he viewed as an illegal attempt by private parties to allocate among themselves Ecuador's natural resources, and his regulation and judgment prohibiting 2% payments on CEPE's oil. (A115.)

and concluded that the district court's factual finding—that the Government had reimbursed the Companies for their investments and had not paid for rights to produce oil—was supported by the overwhelming weight of the evidence. (A13-15.) The court unanimously affirmed the judgment dismissing the unjust enrichment claim. (*Id.*)

REASONS FOR DENYING THE WRIT

The petition does not take issue with the district court's determination that unjust enrichment turns on whether the Government paid the Companies for oil production rights or reimbursed them for their investment. In an effort to circumvent the district court's adverse fact-finding, Phoenix seeks to implicate the act of state doctrine. Its argument is that three Ecuadorian decrees and a regulation issued by the Minister address the issue of what the Government paid for—purportedly by providing that the Government acquired oil production rights in the 1974 and 1977 transactions—and that the act of state doctrine requires that United States courts resolve the fact question of what the Government paid for solely by reference to the decrees and regulation.

The threshold question that Phoenix's argument raises is the interpretation of four Ecuadorian Government pronouncements—Decrees No. 666, 1030 and 1438 and Resolution No. 12560 of the Minister. Before the Court considers any act of state argument, it must decide whether the decrees and regulation address and resolve the question of what the Government paid for in connection with the 1974 and 1977 transactions. This narrow inquiry has no significance beyond resolving Phoenix's unjust enrichment claim in this action. The decrees and regulation bear only on the 1974 and 1977 transactions and do not even relate to Ecuadorian law of general applicability. The meaning of the decrees and regulation has no significance to United States companies seeking to structure commercial transactions here or in Ecuador. Thus, Phoenix's petition for certio-

rari raises issues that demonstrably are not "special and important" (Sup. Ct. R. 17.1).[7]

Should the Court embark on the task of construing the Ecuadorian decrees and regulation, it will quickly become clear that the meanings Phoenix attributes to them are incorrect. A plain reading of the operative provisions of Decrees No. 666, 1030 and 1438 makes clear that they do not determine what the Government paid for in connection with the 1974 and 1977 transactions. They identify the sources of the funds to be drawn on in order to pay the Companies and prescribe procedures for making the payments. Thus, Decree No. 666 earmarks funds from Ecuador's International Monetary Reserve to make the first payment to the Companies and authorizes various state entities, such as the Central Bank, the Finance Minister, and the state-owned oil company, CEPE, to execute the documents required to make the funds available. The provisions of Decree No. 1030 mirror those in Decree No. 666 for the second payment by the Government to the Companies and fix the date for making the payment. Decree No. 1438 also addresses the mechanics, not the object of the payment. It authorizes the General Manager of CEPE to execute documents the Government requires to obtain the letter of credit which the Government was to deliver to Gulf Ecuador as part of the 1977 transaction.[8]

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7 Phoenix's argument that the court of appeals improperly concluded that Ecuador's 1971 Hydrocarbons Law changed the character of rights to produce oil to a revocable license—an argument that has nothing to do with the act of state doctrine (Cert. Pet., p. 59)—likewise is an extremely narrow issue of Ecuadorian law, and its resolution one way or the other does not raise "special and important" policy concerns.

8 Phoenix relies on recitals in Decrees No. 666 and 1030 which refer to acquiring "rights and assets." Recitals have no operative effect. Furthermore, the "rights and assets" phrase that appears in the recitals is the same phrase that appears in documents that were before the district court on defendants' motion for summary judgment. When Phoenix relied on the phrase in purported support of its position that the Government had paid for rights, the district court concluded it was too ambiguous to resolve the issue of what the Government paid for, and directed that a trial be held to resolve the issue. Phoenix Canada Oil Co. Ltd. v. Texaco, Inc., 560 F. Supp. 1372, 1384 (D. Del. 1983).

Resolution No. 12560 of the Minister of Natural Resources, also relied on by Phoenix, reinforces the district court's finding that the Government reimbursed the Companies for their investments. It provides for the execution of a contract by the Government, the Companies and an independent auditor which is to determine the book value of the Companies' investments, less depreciation. (A404-410.) Since the audit was limited to the Companies' investments and was mandated by the Government to establish the amount it would pay to the Companies, the regulation is clear evidence of the Government's intention to reimburse the Companies solely for their investments.[9]

Even if the Court were to adopt Phoenix's interpretation of the Ecuadorian decrees and regulation that it relies on, Phoenix's formulation of the act of state doctrine is totally misconceived. *See, e.g., Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 401 (1964) (the act of state doctrine "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory."); *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682, 697 (1976) ("The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states . . . ."); *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897) ("Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."). The doctrine properly formulated and applied, has no bearing on the resolution of the fact question underlying the unjust enrichment claim.

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9 Phoenix relies on a few other documents in connection with its act of state argument: the audit contract among CEPE, the Companies and the auditor covering the 1974 transaction and a letter written by the Minister of Finance and appended to the 1977 Transfer Agreement. They are not laws. Thus, even if Phoenix's formulation of the act of state doctrine were to be accepted, the documents are irrelevant to its argument that the act of state doctrine mandates that United States courts must look solely to foreign laws to resolve fact issues before the court.

The district court did not hold that the Ecuadorian pronouncements relied upon by Phoenix were invalid. A declaration of invalidity of a foreign government decree requires a finding that the government or its instrumentality lacks authority to promulgate the act in question. *See Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 415 n.17 (1964). In this action, defendants did not challenge the authority of the Government to issue the three decrees and regulation and the district court did not address the question of whether the President and the Minister had the power to issue them.[10]

Phoenix's argument that the district court's holding "in effect invalidated" the Ecuadorian decrees and regulation (Cert. Pet., p. 40), is predicated on the proposition that the act of state doctrine mandates that United States courts affirmatively adopt and apply the laws of a foreign state to the exclusion of all other evidence in resolving fact issues. Phoenix has not cited any authority which supports this formulation of the act of state docrtine and our research has disclosed none. Indeed, the Supreme Court authority cited above indicates that the act of state doctrine is a doctrine of abstention by United States courts. Thus, Phoenix's assertion that the doctrine required the district court to look only at the three decrees and the regulation and exclude all other evidence in determining what the Government paid the Companies for in the 1974 and 1977 transactions is without merit.

Even under Phoenix's interpretation, the decrees and regulation merely would be statements by the Government of what, in fact, it paid for, and thus, simply evidence of the Government's intention. Phoenix has not pointed to any Ecuadorian law man-

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10 Phoenix's argument that the district court selectively applied the act of state doctrine by holding that Resolution No. 11927 barred Phoenix's breach of contract claim and not applying the act of state doctrine to the unjust enrichment claim in Phoenix's favor, is baseless. On defendants' motion for summary judgment, Phoenix challenged the authority of the Minister to issue Resolution No. 11927. The district court, relying on Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), held that the act of state doctrine requires that the regulation be given an irrefutable presumption of validity. Phoenix Canada Oil Co. Ltd. v. Texaco, Inc., 560 F. Supp. 1372, 1381 (D. Del. 1983).

dating that the Government pay the Companies for rights to produce oil in connection with the 1974 or 1977 transaction. Absent such a legal mandate, there is no basis in the act of state doctrine for precluding the district court from finding as a fact that the Government paid the Companies only for their investments. Such a finding could not possibly be considered a judicial determination that the Government of Ecuador had violated Ecuadorian law in carrying out the 1974 and the 1977 transactions.

Phoenix also argues that the decisions below "in effect" level a charge of confiscation against Ecuador, which Phoenix asserts is a matter for the executive branch and not the judiciary. (Cert. Pet., pp. 64-67.) Building on this erroneous characterization of the lower courts' opinions, Phoenix argues that the act of state doctrine, which is designed to prevent the judiciary from interfering with the executive function of making foreign policy, has been violated by the lower courts. (*Id.*)

Phoenix has offered no evidence—and there is none—that the district court's finding might adversely affect United States relations with Ecuador. Phoenix did not submit any evidence of concern by the State Department that a judicial determination of the issue of what the Government paid for might adversely affect relations between the United States and Ecuador. Indeed, the State Department, as Phoenix acknowledges, participated in and endorsed the 1977 transaction. (Cert. Pet., p. 66.) Moreover, the district court's finding that Ecuador owned the rights to produce in perpetuity and that the compensation it paid the Companies could only have been for investment is supported by the testimony of Ecuador's Minister of Natural Resources. (*See, e.g.*, A85-87.) Since the district court's determination that the Companies were paid only for their investment was in full accord with Ecuador's own view of its law, it could not possibly adversely affect American-Ecuadorian foreign relations.

Phoenix raises two other arguments that have nothing to do with the act of state doctrine, but also would have the effect of impeding the district court in carrying out its fact-finding function. Thus, Phoenix contends that the district court improperly

considered testimony of the Minister and his legal advisor in determining what the Government paid the Companies for. These witnesses participated directly in the 1974 transaction and played major roles in determining what the Government paid, and their testimony was highly probative on the issue. Phoenix's attempts to to exclude it are substantively without merit.

United States v. *U.S. Gypsum Co.*, 333 U.S. 364 (1948), upon which Phoenix principally relies, does not purport to set down a general rule of exclusion regarding oral testimony, and is factually inapposite here. The Court in *U.S. Gypsum* reviewed a determination by the district court to credit the cross-examination testimony of certain witnesses even though the testimony conflicted with the witnesses' direct testimony and with contemporaneous documents. 333 U.S. at 395-96. Under these circumstances, the Court held that the cross-examination testimony should be given "little weight." *Id.* at 396. In direct contrast, the direct testimony of the Minister and his legal advisor in this action does not conflict with their cross-examination testimony. Both Government officials testified consistently that the Government paid the Companies only for their investments and that it paid nothing for rights to produce. Nor does the testimony conflict with documentary evidence. The operative provisions of the decrees and regulation that Phoenix relies on, as demonstrated above, do not determine what the Government paid for. And, the phrase "rights and assets," which appears in recitals, was ambiguous as held by the district court. Thus, the testimony of the Minister and his legal advisor clarifies rather than conflicts with the documents relied on by Phoenix.

Phoenix also argues that the deposition testimony of the Minister and his legal advisor should not have been considered because "*post-hoc* statements of legislators have no probative value." (Cert. Pet., p. 54.) The authorities on which Phoenix relies question the utility of legislators' testimony only when it is offered as evidence of the meaning of legislation. Here, the witnesses were not called upon to explain the meaning of legislation. Their testimony was offered solely as proof that the Government intended to reimburse the Companies for their

investments, and the district court properly admitted and considered it for that purpose.

Plainly, what the Government paid for in connection with the 1974 and 1977 transactions is a fact question, and the Ecuadorian decrees and regulation and the other documents that Phoenix relies on are, at best, evidence bearing on its resolution. These enactments, together with the testimony of Ecuador's Minister of Natural Resources and his legal advisor, the amounts of the payments and how they were determined, the history of the Government's relationship with the Companies and other evidence bearing on the central fact issue of what the Government paid for, were part of the trial record. All of the foregoing evidence was properly considered by the district court when it found, as a matter of fact, that the Government reimbursed the Companies for their investments and did not pay for rights to produce oil.

CONCLUSION

For all the foregoing reasons, respondents respectfully submit that the petition should be denied.

Dated: September 26, 1988

Respectfully submitted,

Milton J. Schubin
425 Park Avenue
New York, New York 10022
(212) 836-8000

Counsel of Record and Attorney for Respondents Texaco Petroleum Company, Ecuadorian Gulf Oil Company and Gulf Oil Corporation (now, by change of name, Chevron U.S.A. Inc.)

Of Counsel:

Milton Sherman
Scott M. Berman
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, New York 10022

Attorneys for Respondents Texaco Petroleum Company, Eduadorian Gulf Oil Company, and Gulf Oil Corporation (now, by change of name, Chevron U.S.A. Inc.)

LAWRENCE R. JERZ
Attorney for Texaco Petroleum Company
2000 Westchester Avenue
White Plains, New York 10650